Marquette Law Review

Volume 71
Issue 1 *Fall 1987*

Article 7

The Good Faith Exception to the Exclusionary Rule: The Latest Example of "New Federalism" in the States

Carolyn A. Yagla

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE: THE LATEST EXAMPLE OF "NEW FEDERALISM" IN THE STATES

I. INTRODUCTION

In recent years the United States Supreme Court has diminished its protection of individual rights. In contrast to the Warren Court's view of the judiciary as the guardian of individual liberties, the Burger Court afforded the individual only minimal guarantees.[1] Although this retrenchment has affected all the guarantees contained in the Bill of Rights, the fourth amendment exclusionary rule has suffered the most.[2] The exclusionary rule, which suppresses evidence seized in violation of the fourth amendment,[3] has come under increasing attack from those who assert that "technical" police errors should not allow criminals to go free.[4]

In *United States v. Leon*,[5] the Supreme Court adopted a good faith exception to the exclusionary rule. Evidence obtained pursuant to a warrant based on less than probable cause will now be admitted against a defendant at trial if the police officer was acting in good faith.[6] Thus, the exception reflects a further retreat from previously well established fourth amendment protections. If the Rehnquist Court follows the trend set by the Burger Court, the states may be left

---

1. *See* J. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA 288 (1973); Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249 (1971).

2. Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 874 (1975) [hereinafter Wilkes, *More on the New Federalism*].

3. The fourth amendment exclusionary rule was first applied to federal criminal proceedings in Weeks v. United States, 232 U.S. 383 (1914). *See infra* text accompanying note 15. The rule was extended to the states forty-seven years later in Mapp v. Ohio, 367 U.S. 643 (1961). *See infra* text accompanying note 32.

An analogous exclusionary rule operates in the fifth amendment area to suppress coerced confessions and in the sixth amendment area to suppress statements made without assistance of counsel. *See* Brewer v. Williams, 430 U.S. 387 (1977); Miranda v. Arizona, 384 U.S. 436 (1966).

4. *See, e.g.*, Miles, *Decline of the Fourth Amendment: Time to Overrule* Mapp v. Ohio?, 27 CATH. U.L. REV. 9 (1977); Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635 (1982).

5. 468 U.S. 897 (1984).

6. *Id.* at 905-25.

as the only source of protection for an individual's fourth amendment rights. Recognizing this, a number of states have rejected the *Leon* good faith exception on state constitutional grounds.[7]

This Comment will first take an historical in-depth look at how the Supreme Court has slowly strangled the life from the exclusionary rule. Next, there will be an analysis of the case in which the good faith exception was adopted. Finally, this Comment will examine the "new federalism" among states that are willing to provide their citizens with greater protection than that provided under the Federal Constitution.

II. HISTORICAL PERSPECTIVE

The fourth amendment to the Constitution of the United States provides a "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[8] Through this amendment, the framers intended to protect citizens of the New Republic from the unwarranted governmental intrusions they were subjected to in England.[9] Although the proscription against unreasonable searches was clear, the remedy for a violation of the fourth amendment was not specified. Thus, the Supreme Court faced the task of effectuating an individual's constitutional rights. In order to make the fourth amendment viable, the Court declared that evidence seized during an unconstitutional search must be excluded at the individual's criminal trial.[10] The enunciation of this exclusionary rule has had a

---

7. *See infra* text accompanying notes 143-58.

8. U.S. CONST. amend. IV. The fourth amendment provides in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

9. In England, general warrants and writs of assistance permitted government officials to arrest anyone and search any place they wished. For a discussion of the events leading to the adoption of the fourth amendment, see generally W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1978).

10. Weeks v. United States, 232 U.S. 383 (1914). *See infra* text accompanying note 15.

far-reaching and controversial effect on the law of search and seizure.

A. *The Creation of the Exclusionary Rule*

The origins of the exclusionary rule can be traced back to the 1886 case of *Boyd v. United States*,[11] in which the Supreme Court held that demanding private papers from a defendant to use against him at trial was an invasion of the "indefeasible right of personal security, personal liberty and private property."[12] Relying on both the fourth amendment's ban against unreasonable searches and the fifth amendment's ban against compelled self-incrimination, the Court prohibited the introduction of the papers into evidence.[13] Moreover, the *Boyd* Court noted that it was the duty of the Court to guard the constitutional rights of citizens "against any stealthy encroachments thereon."[14]

The recognition that courts have an obligation to protect individual rights from governmental intrusion was secured by the Supreme Court's enunciation of the exclusionary rule in the landmark case of *Weeks v. United States*.[15] A unanimous Court held that evidence obtained during an illegal search and seizure violated the defendant's fourth amendment rights,[16] and that use of the evidence in a federal criminal proceeding was prohibited:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense,

---

11. 116 U.S. 616 (1886).

12. *Id.* at 630.

13. *Id.* at 634-35. In *Boyd*, the evidence was obtained by the use of a subpoena rather than an unlawful search and seizure. Thus, the exclusion of the evidence was based on the interrelationship of the fourth and fifth amendments as opposed to the fourth amendment alone. In a subsequent case, *Boyd* was construed as pertaining only to cases in which a defendant was compelled to give testimony against himself. *See* Adams v. New York, 192 U.S. 585 (1904).

14. *Boyd*, 116 U.S. at 635.

15. 232 U.S. 383 (1914). The *Weeks* case involved an outrageous search of the defendant's home in connection with an illegal lottery scheme. The police, acting without a warrant, ransacked the house and took several things unrelated to the illegal activity. *Id.* at 387. For an excellent article on the development of the exclusionary rule see Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

16. *Weeks*, 232 U.S. at 397. In contrast to *Boyd*, the *Weeks* Court relied solely on the fourth amendment as authorization for excluding evidence at trial. *Id.* at 393-97.

> the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[17]

The *Weeks* Court emphasized not only the importance of preserving the individual's right to privacy but also the integrity of judicial proceedings. Courts were not to condone the state's illegal activity by permitting the introduction of the tainted evidence.[18] Justice Day explained what has thus become known as the judicial integrity rationale of the exclusionary rule: "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution . . . ."[19]

The fourth amendment proscription against unreasonable searches and seizures was first applied to the states, by virtue of the fourteenth amendment due process clause, in *Wolf v. Colorado*.[20] The states were not, however, constitutionally required to employ the exclusionary rule as the means of enforcing the fourth amendment prohibitions.[21] Instead, the Court held that it was within the competency of the states to choose between exclusion as a sanction and other equally effective

---

17. *Id.* at 393.

18. Justices Holmes and Brandeis were major proponents of the judicial integrity rationale. *See* Olmstead v. United States, 277 U.S. 438 (1928). *See generally* Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 S. CAL. L. REV. 60 (1941).

19. *Weeks*, 232 U.S. at 392.

20. 338 U.S. 25 (1949).

21. The *Wolf* holding marked the first separation of the fourth amendment right from the exclusionary remedy. The dissent soundly criticized the decision to let states implement their own sanctions: "[T]here is but one alternative to the rule of exclusion. That is no sanction at all." *Id.* at 41 (Murphy, J., dissenting).

The views expressed by the majority and the dissent in *Wolf* illustrate the debate that still divides the Supreme Court. One view sees the exclusionary rule as only one of several alternatives for vindication of a fourth amendment violation. The opposite view considers the rule to be mandated by the fourth amendment itself to aid in regulation of the law enforcement system as a whole.

remedies.[22] Thus, the right was federal, but the remedy was decided by each state.[23]

The asymmetry which *Wolf* introduced into fourth amendment law was illustrated in *Lustig v. United States*.[24] There the Court held that evidence given to federal authorities "on a silver platter" by state officers was not excludable in federal trials.[25] The silver platter doctrine enabled federal courts to convict a defendant with evidence the state police seized illegally, so long as the state police broke the law without federal assistance.[26]

The Supreme Court's dissatisfaction with the double standard of admissibility created by the silver platter doctrine led to its eradication in *Elkins v. United States*.[27] Federal courts could no longer receive unconstitutionally seized evidence from federal or state officials. Instead, the fourteenth amendment's limitations on state government were held to be coextensive with the fourth amendment limitations on the federal government.[28] This holding foreshadowed the extension of the exclusionary rule to the states.

The Supreme Court then turned its attention to the justifications for the exclusionary rule. The Court announced that the "purpose [of the rule] is to deter — to compel respect for the constitutional guaranty in the only effectively available

22. At the time *Wolf* was decided only 16 of the 47 states had adopted the exclusionary rule. *Id.* at 38, TABLE I. Other remedies for illegal search and seizure included a civil action under 42 U.S.C. § 1983 (1982) and a federal criminal action under 18 U.S.C. § 242 (1976). *See* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621; Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361 (1981).

23. *See* Geller, *supra* note 22, at 629.

24. 338 U.S. 74 (1949).

25. *Id.* at 78-80. This phrase was coined in *Lustig* to refer to situations in which state officials conducted illegal searches and then gave the seized evidence to federal officials for use in federal court. If the federal officials had seized the evidence themselves, it would have been inadmissible in federal court because they were bound by the exclusionary rule. Thus, the silver platter doctrine was an easy way to get around the exclusionary rule until the rule was extended to the states.

26. *See* Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence*, 8 UCLA L. REV. 1 (1961).

27. 364 U.S. 206 (1960). Before the *Elkins* decision, the only way to forbid the introduction of illegally seized evidence by state officers in state court was to show that it "shock[ed] the conscience." Rochin v. California, 342 U.S. 165, 172 (1952).

28. Stewart, *supra* note 15, at 1379-80.

way — by removing the incentive to disregard it."[29] This emphasis on deterrence was a departure from the *Weeks* case which focused on the importance of private property and judicial integrity. The significance of the departure, however, was not clear until after the exclusionary rule had been applied to the states.[30]

The Supreme Court ended a decade of confusion following *Wolf v. Colorado*, by overruling the decision and repudiating its rationale in *Mapp v. Ohio*.[31] In the *Mapp* case, the police made a warrantless entry into the defendant's home to search for a bombing suspect. No suspects were found but the officers did uncover four obscene books that were hidden in the basement. As a result, Mapp was arrested, tried, and convicted of possession of obscene materials.[32] On appeal, the Supreme Court extended the exclusionary rule to the states, holding that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[33]

In the Court's view, the exclusionary rule was no longer one among a range of options to be selected by the states.[34] It was "an essential part of both the Fourth and Fourteenth Amendments."[35] Indeed, had the exclusionary rule not been inherent in the fourth amendment to the Constitution, it could never have been applied to the states through the fourteenth amendment. The Court explained that rejection of the *Wolf* approach was required because:

---

29. *Elkins*, 364 U.S. at 217.

30. *See infra* text accompanying note 61.

31. 367 U.S. 643 (1961).

32. *Id.* at 643-46. The Ohio Supreme Court relied on *Wolf* and affirmed the lower court's conviction. The Supreme Court reversed and overruled that part of *Wolf* that said state courts were not required to use the exclusionary rule. *See* Stewart, *supra* note 15, at 1367.

33. *Mapp*, 367 U.S. at 655. An undeniable factor in extending the exclusionary rule to the states was the ineffectiveness of other remedies. *See* Schroeder, *supra* note 22, at 1386-97.

34. *See generally* Burns, Mapp v. Ohio: *An All-American Mistake*, 19 DE PAUL L. REV. 80 (1969); Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319; Wilson, *Perspectives of* Mapp v. Ohio, 11 U. KAN. L. REV. 423 (1963).

35. *Mapp*, 367 U.S. at 657. The prohibition also applies to the fruits of the illegally seized evidence. Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

> [T]he admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.[36]

Thus, the exclusionary rule became an integral part of the fourth amendment guarantee of individual privacy.[37]

B. The Debate: Should the Criminal Go Free Because the Constable Blundered?[38]

1. The Arguments Against the Exclusionary Rule

The exclusionary rule has been under constant criticism since it was first announced in *Weeks v. United States*.[39] Because the rule suppresses otherwise reliable evidence, the most obvious criticism is that it operates to protect fourth amendment guarantees only by imposing an unreasonably high cost on society:[40] "The physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant . . . . Appli-

---

36. *Mapp*, 367 U.S. at 656. *See generally* Broeder, *The Decline and Fall of* Wolf v. Colorado, 41 NEB. L. REV. 185 (1961).

37. The *Mapp* holding employed all of the various rationales previously cited for the exclusionary rule. Justice Clark summed it up by stating, "[o]ur decision . . . gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." 367 U.S. at 660.

38. People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). Justice Cardozo was an outspoken opponent of the exclusionary rule. In *DeFore* he stated, "[t]he criminal is to go free because the constable has blundered . . . . A room is searched against the law, and the body of a murdered man is found . . . . The privacy of the home has been infringed, and the murderer goes free." *Id.* at 23-24, 150 N.E. at 587-88.

39. 232 U.S. 383 (1914). Some of the rule's worst critics are presently seated on the Supreme Court. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 246 (1983) (White, J., concurring); California v. Minjares, 443 U.S. 916 (1979) (Rehnquist, J., dissenting from denial of stay); Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring); Brown v. Illinois, 422 U.S. 590, 609-12 (1975) (Powell, J., concurring); Schneckloth v. Bustamonte, 412 U.S. 218, 261-71 (1973) (Powell, J., concurring).

For an excellent example of the debate compare Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215 (1978) with Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?*, 62 JUDICATURE 67 (1978).

40. *See* Stewart, *supra* note 15, at 1393.

cation of the rule thus deflects the truth-finding process and often frees the guilty."[41]

The truth-finding process is distorted because relevant evidence is barred and as a result, the defendant is not tried on the basis of "all the evidence which exposes the truth."[42] Further, the trial's focus is diverted from ascertaining the guilt or innocence of the defendant to scrutinizing police behavior.[43] When a criminal is released because the police have violated his constitutional rights, it implies that the officer's conduct posed a greater threat to society than the criminal act. In cases of egregious police behavior, this implication may be correct.[44] But when the crime is first degree murder and the sole impropriety of the police was their failure to obtain the proper warrant, suppression of the evidence occasions public outrage.[45] In such instances, opponents maintain that the criminal should not avoid punishment because of a mere "technicality."[46]

The second criticism of the exclusionary rule is that there are no benefits to balance the cost of the rule's application. For example, the exclusionary rule has been justified on the basis of judicial integrity. This rationale is easily defeated because the introduction of illegally seized evidence "work[s] no new Fourth Amendment wrong."[47] Thus, the court is not perceived as a party to the constitutional violation when it allows the evidence in at trial. Instead, opponents argue that it is the exclusion of reliable evidence and the release of

41. Stone v. Powell, 428 U.S. at 490.

42. *Id.* at 489 (quoting Alderman v. United States, 394 U.S. 165, 174-75 (1969)).

43. *See* Wilkey, *supra* note 39, at 222.

44. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952). In this case, the police jumped on Rochin and attempted to retrieve the pills that he had swallowed. When their attempt failed, Rochin was taken to a hospital where doctors forced an emetic solution into his stomach, causing him to regurgitate the evidence. *Id.* at 166.

45. Massachusetts v. Sheppard, 468 U.S. 981 (1984). *See also* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

46. Many critics argue that the exclusionary rule is hypertechnical: "[F]rom the point of view of laymen unversed in refinements of constitutional theory, [the American exclusionary rule] is sometimes an outrage to common sense. It often results in the freeing of someone convicted of a vicious criminal act for what strikes the crime - conscious public as finicking or trivial reasons." Wilkey, *supra* note 39, at 223 n.32 (quoting The Washington Star, July 7, 1975, at A16).

47. United States v. Calandra, 414 U.S. 338, 354 (1974).

criminals that discredits the judicial system.[48] Similarly, the proclaimed benefit of deterrence does not withstand close analysis. Excluding the evidence will theoretically punish the police officer who made the illegal search and seizure and thus deter the police from committing similar violations in the future. But opponents of the rule assert that there is no empirical data to support the conclusion that excluding evidence against a defendant punishes the officer involved or deters other officers from future violations.[49]

The third criticism commonly raised to the exclusionary rule focuses on its indiscriminate approach. Evidence is suppressed without consideration of whether the police officer willfully violated the law or used his best judgment under the circumstances.[50] The sanction seems extreme in light of the fact that the police are often forced to make quick decisions regarding whether there is probable cause to support a search. Under the general language of the fourth amendment, there is much room for disagreement. The rule's indifference to the severity of the police officer's error "is contrary to the idea of proportionality that is essential to the concept of justice."[51] As Chief Justice Burger pointed out, "society has at least as much right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition."[52] Since the fourth amendment contains no provision expressly precluding the use of evidence obtained in violation

48. *See* Wilkey, *supra* note 39, at 223-25.

49. The studies done on the exclusionary rule's deterrent effect are inconclusive at best. *See* S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (1977); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973).

The issue is complicated by differing perspectives on the type of deterrence the rule exerts. The "specific deterrence" rationale theorizes that the rule should deter individual police officers. The "systematic deterrence" rationale asserts that the rule exerts a regulatory effect on the law enforcement system as a whole. *See* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 395-99 (1981).

50. *See* Wilkey, *supra* note 39, at 225-26.

51. Stone v. Powell, 428 U.S. 465, 490 (1976).

52. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

of its command, opponents of the rule assert that a less costly alternative should be employed.

2. The Arguments for the Exclusionary Rule

Proponents of the exclusionary rule respond that much of this criticism is misdirected.[53] It is not the sanction that imposes limits on the exercise of police power, it is the constitutional provisions themselves. As Justice Clark noted in *Mapp v. Ohio*: "The criminal goes free, if he must, but it is the law that sets him free."[54] The adoption of the fourth amendment reflects the framers' intent that it is better that some criminals go free than that the privacy rights of all people be sacrificed.

> The problem with the exclusionary rule is that it works after the fact, so that by then we know who the criminal is, the evidence against him, and the other circumstances of the case. If there were some way to make police obey, in advance, the commands of the Fourth Amendment, we would lose at least as many criminal convictions as we do today, but in that case we would not know of the evidence which the police could discover only through a violation of the Fourth Amendment. It is possible that the real problem with the exclusionary rule is that it flaunts before us the price we pay for the Fourth Amendment.[55]

As a means of ensuring the fourth amendment guarantee of privacy, proponents argue that the rule has accomplished just what was intended. Following *Mapp v. Ohio*,[56] police academies began to train officers on the contours of fourth amendment procedures.[57] As a result of the increased amount of training, there was a dramatic increase in the number of search warrants issued. Therefore, the exclusionary rule is successful in promoting observance of the fourth amendment. The fact that violations still occur does not indicate that the exclusionary rule is ineffective. Rather, it reflects the need for

---

53. *See* Stewart, *supra* note 15, at 1392. *See generally* Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S. TEX. L.J. 559 (1982).

54. Mapp v. Ohio, 367 U.S. 643, 659 (1961).

55. J. KAPLAN, CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIAL 208 (1978).

56. 367 U.S. 643 (1961).

57. *See* Kamisar, *supra* note 39, at 69-73.

continued observation by the Court to ensure that the rule is enforced.[58]

Not only is there a beneficial impact on law enforcement agencies, but the costs of applying the rule are not nearly as high as some opponents assert. The exclusionary rule very rarely has an adverse effect on the outcome of a criminal trial. One study suggested that the rule results in the non-prosecution or non-conviction of only 0.6% to 2.35% of individuals arrested for felonies.[59] Although the estimates are higher for crimes in which the prosecution depends heavily on physical evidence, the non-prosecution rate is still within the range of 2.8% to 7.1%.[60] Proponents of the rule argue that this is not too high a price to pay to ensure the sanctity of a person's home and effects. Therefore, the exclusionary rule should remain the safeguard of fourth amendment rights.

C. *Exceptions to the Rule of* Mapp

Faced with the inherent conflict between the exclusionary rule and the trial of a criminal defendant based on all relevant evidence, the Supreme Court opted in favor of the latter after 1961. Gradually the Court retreated from the broad assertion of fourth amendment rights announced in *Mapp v. Ohio*, using the "new" deterrence rationale to carve out exceptions to the exclusionary rule.[61] Pointing to deterrence as the primary objective, the Court reasoned that anything that did not serve the rule's deterrent purpose did not justify the cost of its appli-

---

58. *See* Stewart, *supra* note 15, at 1395-96.

59. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 621.

60. *Id.* at 680.

61. Compared to the other justifications for the rule, the deterrence rationale was relatively new. It was first announced only one year before Mapp v. Ohio was decided. *See supra* text accompanying note 27.

Since *Mapp*, the Supreme Court has created several exceptions to the exclusionary rule. *See, e.g.*, United States v. Santana, 427 U.S. 38 (1976) (searches under hot pursuit); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent searches); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view searches); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (administrative searches); Chimel v. California, 395 U.S. 752 (1969) (searches incident to arrest); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk searches); Warden v. Hayden, 387 U.S. 294 (1967) (searches under exigent circumstances).

cation. For example, the case of *Linkletter v. Walker*[62] presented the issue of whether the *Mapp* holding should be applied retroactively. The Supreme Court explained that the deterrence of lawless police actions was the only effect of the exclusionary rule. Since the misconduct of police prior to the *Mapp* case had already occurred, the deterrent purpose of the rule would not be advanced by making the holding retroactive.[63]

The deterrence rationale was again used to confine the scope of the exclusionary rule in *Alderman v. United States*.[64] The Court held that defendants whose fourth amendment rights were not violated lacked standing to move to suppress evidence obtained in violation of the fourth amendment rights of others. The rationale for the ruling was that the additional benefit of extending the exclusionary rule to other defendants did not justify the accompanying infringement on the public's interest in prosecuting those accused of a crime on the basis of all the evidence.[65]

Although these cases limited the application of the exclusionary rule, they did not attack the rule itself. The direct assault came in the dissenting opinion of *Bivens v. Six Unknown Federal Narcotics Agents*,[66] in which Chief Justice Burger criticized the use of the exclusionary rule in any situation. Based on the lack of empirical evidence showing that the rule has deterrent value, he asserted it should be replaced by a more effective remedy.[67] While the Chief Justice stated that

---

62. 381 U.S. 618 (1965).

63. In deciding whether to make a holding apply retroactively, the Court considers "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297 (1967).

64. 394 U.S. 165 (1969).

65. *Id.* at 174-75. The Court's analysis of the costs versus the benefits involved in application of the exclusionary rule led to the balancing approach adopted in United States v. Calandra, 414 U.S. 338 (1974). *See infra* text accompanying note 70. *See generally* Comment, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127 (1984) (an in-depth look at the balancing approach).

66. 403 U.S. 388 (1971) (Burger, C.J., dissenting). The former Chief Justice has always been a staunch opponent of the exclusionary rule. *See* Burger, *Who Will Watch the Watchman*, 14 AM. U.L. REV. 1 (1964).

67. *Bivens*, 403 U.S. at 422-23 (Burger, C.J., dissenting). Burger asserted that Congress should enact an administrative remedy against the government itself to compensate persons whose fourth amendment rights had been violated. He argued that such a

the rule should not be abandoned until an alternative remedy was implemented, he indicated that his Court was receptive to the change: "Independent of the alternative embraced in this dissenting opinion, I believe the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced."[68]

In keeping with the historical tendency of the Supreme Court to adopt the position of its Chief Justice, the Court began to "narrow the thrust" of the exclusionary rule.[69] In *United States v. Calandra*,[70] the Court refused to invoke the rule when a grand jury witness was questioned about illegally seized evidence. After extensively quoting the deterrence language used in *Elkins v. United States*,[71] the Court concluded that "[i]n sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[72]

This statement has had several far-reaching implications. For the first time, deterrence was advanced as the paramount justification of the exclusionary rule and the judicial integrity rationale was discarded by the Court.[73] Justice Powell made

---

statutory scheme would have an advantage over the exclusionary rule because it would provide some remedy to the innocent victims of police misconduct.

68. *Id.* at 424.

69. Kurland, *Enter the Burger Court: The Constitutional Business of the Supreme Court, O.T. 1969*, 1970 SUP. CT. REV. 1, 1-2.

70. 414 U.S. 338, 349-52 (1974). For a detailed analysis of the *Calandra* holding see Schrock & Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983).

71. 364 U.S. 206 (1960).

72. *Calandra*, 414 U.S. at 348. Justice Brennan, joined by Justices Douglas and Marshall, criticized the majority's characterization of the exclusionary rule as a judicially created deterrence measure: "This downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule." *Id.* at 356 (Brennan, J., dissenting).

73. The majority of the Court gradually disregarded the judicial integrity rationale as they were presented with police conduct far less egregious than that in *Weeks* and *Mapp*. The dissenters, however, still asserted that originally the rule was based on judicial integrity and it should remain that way.

it clear that exclusion was not necessary to keep courts from participating in unconstitutional activity: "Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong."[74]

The statement also settled the question of the basis for the exclusionary rule. According to the Supreme Court in *Calandra*, exclusion was not one of the rights conferred by the fourth amendment.[75] Instead, it was a remedy designed to effectuate those rights. The characterization of the exclusionary rule as a remedial device gave rise to the balancing process used today to determine whether application of the rule is warranted in a particular case.

In practice, balancing the cost of excluding relevant evidence against the potential for deterring police misconduct usually leads to admission of the evidence. For example, the Court permitted the use of illegally seized evidence in a federal civil suit on the grounds that the costs outweighed the benefits.[76] The Court also allowed the use of evidence seized in violation of fourth amendment standards to impeach defendants testifying in their own behalf.[77] Finally, the Court refused to exclude evidence when law enforcement agents acted in a good faith reliance upon laws later held to be unconstitutional.[78]

Thus, the exclusionary rule has evolved from a constitutional right to its present interpretation as a judicial remedy applicable only when it will advance the goal of deterrence. This represents a dangerous trend. For the first time, the United States Supreme Court has retrenched on a constitutional right. Yet, the modification occurred without any explanation from the Court. One commentator stated that a major success of the rule's critics has been in redefining the issue: "By portraying the exclusionary rule as a pragmatic social policy, rather than as a necessary adjunct to basic con-

74. *Calandra*, 414 U.S. at 354.

75. *Id.* at 347-48.

76. United States v. Janis, 428 U.S. 433 (1976).

77. United States v. Havens, 446 U.S. 620 (1980); Walder v. United States, 347 U.S. 62 (1954).

78. Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Peltier, 422 U.S. 531 (1975).

stitutional principles, the critics have shifted the scope of debate from their losing position on legal principles to the ambiguous outcome of empirical evaluation."[79] It is with knowledge of the Supreme Court's shift from the interest in protecting individual rights to the interest in convicting the guilty that the good faith exception should be analyzed.

D. The Road to Good Faith

The Supreme Court's latest effort to restrict the exclusionary rule is the good faith exception. Proponents of the exception argue that the goal of deterrence is not furthered when a police officer, acting in good faith, does not realize that his conduct has violated the fourth amendment.[80] In addition to the subjective standard, there is the objective requirement that the officer's ignorance be reasonable. The good faith exception first received attention by virtue of its mention in Justice White's dissent in *Stone v. Powell*:[81]

> When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is

---

79. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U.L. REV. 740, 776-77 (1974).

80. Due to the growing realization that many of the Supreme Court's decisions in the fourth amendment area are unclear and difficult to apply, the good faith exception has become a major topic of debate. *See, e.g.*, Brown, *The Good Faith Exception to the Exclusionary Rule*, 23 S. TEX. L.J. 655 (1982); Jensen & Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916 (1982); Kamisar, Gates, "*Probable Cause*," "*Good Faith*" *and Beyond*, 69 IOWA L. REV. 551 (1984); LaFave, "*The Seductive Call of Expediency*": United States v. Leon, *Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895; Leonard, *The Good Faith Exception to the Exclusionary Rule: A Reasonable Approach for Criminal Justice*, 4 WHITTIER L. REV. 33 (1982).

81. 428 U.S. 465 (1976). Proposals for a modification of the exclusionary rule have come from governmental and academic levels also. *See* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 55 (Aug. 17, 1981) (proposal for the good faith exception).

On the academic level, the American Law Institute promulgated a Model Code of Pre-Arraignment Procedure which provided that a motion to suppress illegally obtained evidence should be granted only if the court finds the violation to be willful. *See* A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2(2) (1975).

> kept from the trier of fact and the truth-finding function of the proceeding is substantially impaired or a trial totally aborted.[82]

Justice White's position did not go unnoticed. After hearing oral arguments in *Illinois v. Gates*,[83] the Supreme Court set the case aside for reargument on the issue of whether the exclusionary rule should be modified to include a good faith exception. The Court subsequently declined to address the issue because it was not raised in the lower courts. Nevertheless, the case gave Justice White an opportunity to expand on the line of reasoning he began in *Stone*. He stated that irrespective of its original rationale, the exclusionary rule is no longer recognized as a constitutional right.[84] Instead, as set forth in *United States v. Calandra*,[85] and its progeny,[86] the rule is a judicially created remedy designed to deter police misconduct.[87] In cases of good faith violations of the fourth amendment, there will be only a minimal deterrent effect. Since the cost of invoking the exclusionary rule outweighs the deterrent effect achieved by its strict application, an exception should be created.[88]

---

82. *Stone*, 428 U.S. at 540 (White, J., dissenting).

83. 462 U.S. 213 (1983). Prior to *Gates*, courts used the two-pronged *Aguilar-Spinelli* test in determining whether there was the requisite probable cause to issue a warrant. *See* Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). The first prong considered the "veracity" of the information provided. The second prong examined the "reliability" and "basis of knowledge" of the informant. Illinois v. Gates, 462 U.S. 213, 228-29 (1983). In *Gates*, the Supreme Court abandoned the two-prong test and adopted the more relaxed "totality of the circumstances" test to establish probable cause. *Id.* at 229-35.

84. *Gates*, 462 U.S. at 254 (White, J., concurring).

85. 414 U.S. 338 (1974).

86. *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Ceccolini, 435 U.S. 268 (1978); United States v. Janis, 428 U.S. 433 (1976); Brown v. Illinois, 422 U.S. 590 (1975).

87. *Gates*, 462 U.S. at 257 (White, J., concurring). Justice White explained:

> Exclusion of evidence is not a personal constitutional right but a remedy which like all remedies, must be sensitive to the costs and benefits of its imposition. The trend and direction of our exclusionary rule decisions indicate not a lesser concern with safeguarding the Fourth Amendment but a fuller appreciation of the high costs incurred when probative, reliable evidence is barred because of investigative error.

Id.

88. The Fifth Circuit adopted a good faith exception in United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). The holding was based on what that court perceived to be the Supreme Court's adoption of a techni-

III. THE ADOPTION OF A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE: *UNITED STATES V. LEON*

In *United States v. Leon*,[89] the California Police Department initiated a drug trafficking investigation based on a tip from a confidential informant.[90] After surveillance of the respondent's activities, an affidavit was prepared and a search warrant was issued by a state court judge. A subsequent search uncovered large quantities of cocaine and methaqualone.[91]

Upon indictment for federal drug offenses, the respondents moved to suppress the evidence. The district court granted the motion in part,[92] concluding that the affidavit was insufficient to establish probable cause.[93] While noting that the officer involved had acted in good faith, the court rejected the suggestion that good faith reliance on a warrant would justify

---

cal violation. *See* Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Peltier, 422 U.S. 531 (1975). *See generally* Comment, *Exclusionary Rule: Good Faith Exception - The Fifth Circuit's Approach in* United States v. Williams, 15 GA. L. REV. 487 (1981).

89. 468 U.S. 897 (1984). The companion case of Massachusetts v. Sheppard involved the murder of a young woman. Upon finding her badly burned body in a vacant lot, the police initiated an investigation which led them to one of her boyfriends. The police then applied for and received a search warrant to search his home. *Sheppard*, 468 U.S. 981, 984-86 (1984).

90. *Leon*, 468 U.S. at 901. There were actually four defendants charged in the *Leon* case and the facts given refer to the investigation and proceedings against all four of them. The tip related to various drug deals including one that the informant had witnessed himself. *Id.*

91. *Leon*, 468 U.S. at 902. The search of Sheppard's home produced a pair of bloodstained boots, a hairpiece subsequently identified as the victim's, and a woman's bloodstained earring. *Sheppard*, 468 U.S. at 987 n.4.

92. *Leon*, 468 U.S. at 903. The court granted the motions only in part because none of the respondents had the requisite standing to challenge all of the searches. *Id.* For a discussion of the standing requirement see *supra* text accompanying notes 68-69.

93. *Leon*, 468 U.S. at 903. Because the informant had made the observations of the respondents' illegal activity six months before telling the police, there was a staleness problem. Also, the affidavit failed to establish the informant's credibility. *Id.* at n.2. Thus, the warrant failed to meet the probable cause standard under the *Aguilar-Spinelli* test.

In *Sheppard*, the warrant was issued on a pre-printed form authorizing searches for controlled substances rather than weapons. Further, the affidavit specifying the items to be seized was not attached. The warrant, therefore, was defective in that it failed to describe with particularity the items to be seized. *Sheppard*, 468 U.S. at 987.

not applying the exclusionary rule.[94] The court of appeals affirmed, also rejecting the invitation to recognize a good faith exception.[95] The United States Supreme Court reversed, however, holding that "the excusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[96]

A. The Leon *Majority*

Justice White, writing for the majority, began by stating that the fourth amendment does not explicitly refer to the exclusionary rule. Thus, the decision to apply the sanction is an issue separate from the question of a fourth amendment violation.[97] To determine if the exclusionary rule is appropriate in a particular case, Justice White stated that the Court must employ the cost-benefit analysis used in *United States v. Calandra*.[98] In evaluating the costs, the Court referred to the substantial social cost of the rule's "interference with the criminal justice system's truth-finding function" and the con-

---

94. *Leon*, 468 U.S. at 904. In *Sheppard*, the lower court let the evidence in because the police had acted in good faith. However, the Massachusetts Supreme Judicial Court reversed because the United States Supreme Court had not recognized a good faith exception. *Sheppard*, 468 U.S. at 987.

95. *Leon*, 468 U.S. at 904. On appeal to the United States Supreme Court, the government did not challenge the finding of insufficient probable cause. Although it may have had a valid argument under the new probable cause standard announced in Illinois v. Gates, the government was only interested in establishing a good faith exception. Thus, the good faith question was the only issue presented to the Supreme Court. *Id.*

96. *Leon*, 468 U.S. at 900. The *Sheppard* Court concluded that the exclusionary rule was not applicable to situations where the officer acted in "objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid." *Sheppard*, 468 U.S. at 987-88. Therefore, the evidence seized was admissible even though the warrant did not state with particularity the items to be seized.

The Court noted that the police officer had properly described the items to be seized in the affidavit and had reasonably relied on the magistrate's representations that the search requested was authorized. *Sheppard*, 468 U.S. at 989. *Leon* and *Sheppard* together create the good faith rule for situations in which the police possess a warrant.

97. *Leon*, 468 U.S. at 906 (quoting Illinois v. Gates, 462 U.S. 213, 223 (1983)).

98. 414 U.S. 338 (1974). The Supreme Court reaffirmed its proposition that the use of evidence seized from a past illegal search "work[s] no new Fourth Amendment wrong." *Id.* at 354. Thus, the Court fully embraced the concept that the exclusionary rule is only a remedial device and not a constitutional mandate.

sequence that "some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains."[99] In evaluating the benefits, the Court concluded that in cases of good faith reliance on a defective search warrant, the deterrent effect was "marginal or non-existent."[100] This reasoning focused on the officer's good faith reliance on the validity of the search warrant rather than on the magistrate's good faith determination of probable cause.

Justice White gave three reasons why excluding evidence would not have a deterrent effect on the issuing judge or magistrate. First, the purpose of the exclusionary rule is to modify police behavior rather than "punish the errors of judges and magistrates."[101] Second, there is no indication that magistrates are inclined to circumvent fourth amendment limitations. Third, the rule is not effective as a deterrent to judges because they are "not adjuncts to the law enforcement team," nor do they have a personal "stake in the outcome of particular criminal prosecutions."[102] Based on these assertions, the Supreme Court concluded that if a deterrent effect were to be found, it must be on the behavior of the individual police officer. Since "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations," the good faith exception was adopted.[103]

---

99. *Leon*, 468 U.S. at 907.

100. *Id.* at 922.

101. *Id.* at 916.

102. *Id.* at 917. The Court dismissed as speculative the arguments that application of the exclusionary rule to the facts in *Leon* and *Sheppard* would promote the police to be diligent in their duties and discourage magistrate shopping. *Id.* at 918-21. The Court also rejected the suggestion that the good faith exception would inhibit the growth of fourth amendment law. *Id.* at 922-25.

103. *Leon*, 468 U.S. at 921. Despite the creation of the good faith exception, there are some situations in which the exclusionary rule will apply.

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false. . . . The exception . . . will also not apply in [those] cases where the issuing magistrate wholly abandoned his judicial role . . . [such that] no reasonably well trained officer should rely on the warrant. . . . Finally, . . . a warrant may be so facially deficient . . . that the executing officers cannot reasonably presume it to be valid.

Id. at 923.

B. *The* Leon *Dissent*

Justice Brennan joined by Justice Marshall dissented from the majority position, reiterating arguments they had posed since the *Calandra* decision. Justice Brennan first attacked the premise that the exclusionary rule is a judicially created remedy rather than a constitutional right. He pointed out that such a conclusion does not logically follow from the fact that the fourth amendment does not expressly provide for the exclusion of evidence: "Many of the Constitution's most vital imperatives are stated in general terms and the task of giving meaning to these precepts is therefore left to subsequent judicial decision-making in the context of concrete cases."[104] Nor does such a conclusion follow from the cases that created the exclusionary rule. According to *Weeks v. United States*[105] and *Mapp v. Ohio*,[106] the right of exclusion was a "coordinate component" of the right to be free from unreasonable governmental intrusions.[107]

Even ignoring the constitutional origins of the rule, the dissenters still felt that the deterrence theory was "misguided and unworkable."[108] They stated that the emphasis on the empiricism of a deterrence principle drew the Court into "a curious world where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' of such exclusion are made to disappear with a mere wave of the hand."[109] The dissenters criticized the Court's inability to recognize the main benefit of the rule, namely institutional observance of fourth amendment requirements. Justice Brennan feared that the good faith exception would remove this incentive and place a "premium on police ignorance of the law."[110]

---

104. *Leon*, 468 U.S. at 932 (Brennan, J., dissenting).

105. 232 U.S. 383 (1914).

106. 367 U.S. 643 (1961).

107. *Leon*, 468 U.S. at 935 (Brennan, J., dissenting). Justice Brennan's dissent was based on his view of the exclusionary rule being constitutionally compelled as indicated by the *Weeks* and *Mapp* decisions. He also asserted the judicial integrity rationale of the older cases which forbade courts from aiding the government in its violation of the Constitution. *Id.* at 935-38.

108. *Id.* at 930.

109. *Id.* at 929.

110. *Id.* at 955. This fear was echoed in Justice Blackmun's concurrence. He stated that the *Leon* decision would have to be altered if the good faith exception re-

Most importantly, the dissent criticized the artificial distinction made between the magistrate and the police officer:

> Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence.[111]

According to Justice Brennan, the "evidence-gathering role of the police" is intertwined with the "evidence-admitting function of the courts."[112] He stated that the unlawful seizure of evidence is a governmental action and once the connection between the role of the police and the role of the court is credited, the plausibility of the majority holding becomes suspect.[113]

C. *Analysis*

The *Leon* decision has been written gradually over the course of many years. When viewed in the isolation of a cost - benefit analysis, it seems to be another step in a logical progression. When viewed in light of the overall goal of the fourth amendment and the decision's future implications, however, the good faith exception loses much of its appeal.

1. The Original Goal of the Fourth Amendment

The existence of the fourth amendment reflects the framers' belief that the effort to combat crime should not overtake

---

sulted in a "material change in police compliance with the Fourth Amendment." *Id.* at 928 (Blackmun, J., concurring).

111. *Id.* at 933 (Brennan, J., dissenting).

112. *Id.* According to Justice Brennan, the good faith exception conveys the message that magistrates need not be diligent in their duties. It also encourages police officers to provide only the minimum amount of information neccessary to secure a warrant. Once under the warrant, all police conduct will be insulated from review so long as it is not "entirely unreasonable." *Id.* at 956-57 (quoting Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring in part)).

113. *Id.* at 933. Justice Stevens filed a separate dissent, criticizing the majority for creating the good faith exception when it could have decided the case on other grounds. He argued that had the case been remanded and considered in light of the Illinois v. Gates decision, the matter would have been resolved. Stevens also voiced a concern that the good faith exception would encourage the police to take a chance and present an application they know is insufficient. Therefore, the deterrent value of the exclusionary rule is seriously damaged.

the individual's right to privacy. The Constitution balances the interest in public safety and the interest in individual privacy by allowing governmental invasion only when it is done in a reasonable manner. A reasonable manner usually connotes a showing of probable cause and the possession of a valid search warrant.

> An analysis of costs and benefits is built into the amendment itself. What courts must decide in the individual case is whether the government acted reasonably in invading the individual's privacy, not whether protection of such privacy is too costly or of too little benefit to support vindication of the right once they find a violation.[114]

Not only has the Supreme Court lost sight of the framers' intent to protect individual rights, it has increasingly overlooked the exclusionary rule's effectiveness in vindicating those rights once violated. The Court's interpretation of the rule's purpose has shifted from consideration of whether the exclusionary rule is an appropriate remedy for fourth amendment violations to whether it deters unlawful police conduct by "punishing" the offending officer.[115] The purpose of exclusion is not to punish the specific officer, but to restrain the power of the government as a whole.[116] Exclusion prevents the government from obtaining the aid of the judiciary in giving effect to fourth amendment violations by hearing the tainted evidence.

Weeks v. United States[117] and *Mapp v. Ohio*[118] used the judicial integrity concept as a justification for the exclusionary rule. However, courts have construed the language in *Mapp* as only recognizing the rule's deterrent function. *Mapp* did not refer to punishment of individual officers. Instead, it

---

114. Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith,"* 36 VAND. L. REV. 1511, 1535 (1983).

> A legal system that attempts simultaneously to control unacceptable deviance and the behavior of the laws' enforcers is understandably complex in its application to individual situations. A result in a specific case may seem inefficient and improper. But such inefficiency and impropriety may be the cost of having and enforcing controls upon the controllers — the fourth amendment, for example — in the first place.

Id. at 1535-36 (footnotes omitted).

115. *Id.* at 1536.

116. *Leon*, 468 U.S. at 941 (Brennan, J., dissenting).

117. 232 U.S. 383 (1914).

118. 367 U.S. 643 (1961).

asserted that exclusion was necessary to deter by "compel[ling] respect for the constitutional guaranty . . . by removing the incentive to disregard it."[119] Thus, deterrence was not aimed at punishing a specific officer but at demanding a legal system that did not support a fourth amendment violation: "*Mapp*'s concept of deterrence was inherent in, rather than separate from, its interest in judicial integrity . . . ."[120] These theoretical underpinnings should not be ignored.

2. Costs Versus Benefits: An Artificial Balance

The *Leon* Court utilized the familiar balancing test to support the latest modification of the exclusionary rule. After the "ritual incantation of the 'substantial social costs' " involved, the Court concluded that the minimal deterrent value on officers acting in good faith did not justify application of the rule.[121] Considering the cases decided since *Calandra*, this seems like a predetermined conclusion.

Assuming that the advisability of another modification of the exclusionary rule could properly be decided by a cost - benefit analysis, the Supreme Court should have engaged in a fair assessment of the factors.[122] Instead, Justice White greatly overstated the costs. As previously noted, studies have shown that the exclusionary rule results in the non-conviction of a very small percentage of individuals.[123] In terms of numbers, the convictions lost in 1979 equaled eight out of ten thousand.[124] One reason that so few trials are adversely affected is that the supression of some evidence does not automatically leave the prosecution without a viable case. If the Court in *Leon* had applied the more lenient probable cause standard announced in *Illinois v. Gates*,[125] for example, the warrant probably would have survived scrutiny. Further, none of the defendants in the *Leon* case had standing to chal-

119. *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). *See also* Ingber, *supra* note 114, at 1536-37.

120. *See* Ingber, *supra* note 114, at 1537.

121. *Leon*, 468 U.S. at 949 (Brennan, J., dissenting).

122. *See* LaFave, *supra* note 80, at 903.

123. *See supra* note 59 and accompanying text.

124. *See* Davies, *supra* note 59, at 654.

125. 462 U.S. 213 (1983). *See supra* note 83.

lenge all of the drug searches conducted.[126] Therefore, the bulk of the evidence seized would have been admissible.

Whatever the total costs of applying the exclusionary rule are, it is not fair to use all of them when engaging in a cost - benefit analysis.[127] In reviewing figures from various studies, Justice Brennan stated:

> Of course, these data describe only the costs attributable to the exclusion of evidence in all cases; the cost due to the exclusion of evidence in the narrower category of cases where police have made objectively reasonable mistakes must necessarily be even smaller. The Court, however, ignores this distinction and mistakenly weighs the aggregated costs of exclusion in *all* cases, irrespective of the circumstances that led to exclusion against the potential benefits associated with only those cases in which evidence is excluded because police reasonably but mistakenly believe that their conduct does not violate the Fourth Amendment. When such faulty scales are used, it is little wonder that the balance tips in favor of restricting the application of the rule.[128]

In contrast to the overstatement of costs, the *Leon* opinion underrated the benefits associated with the exclusionary rule. The Court mistakenly reviewed the deterrent value of the rule in terms of how well it would punish individual police officers for their violation of fourth amendment standards. This "specific deterrence" approach is unnecessarily narrow. The deterrent value of the exclusionary rule is realized in its regulatory effect on the law enforcement system as a whole. Application of the rule can have a deterrent effect even if the officer acted with a good faith but mistaken belief that his conduct was authorized by a valid search warrant:[129]

> If evidence is consistently excluded in these circumstances, police departments will surely be prompted to instruct their officers to devote greater care and attention to promoting sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form of the warrant that they have been issued, rather than automatically assuming that whatever document the magis-

126. For a discussion of the standing requirement see *supra* notes 64-65 and accompanying text.

127. *See* LaFave, *supra* note 80, at 904.

128. *Leon*, 468 U.S. at 951 (Brennan, J., dissenting) (citations omitted).

129. *Id.* at 954.

trate has signed will necessarily comport with Fourth Amendment requirements.[130]

The "specific deterrence" concept used by the Supreme Court is also unnecessarily narrow in that it discards the exclusionary rule's deterrent effect on magistrates. The fourth amendment was intended to restrain both the officer and the magistrate as members of the government. Arguably, the magistrate, as the guardian of the court, is more responsible than the police officer for protecting fourth amendment rights and for preventing the use of illegal evidence in court. Yet the good faith exception insulates the magistrate's decisions from review.[131] There is nothing left to deter them from carelessly considering warrant applications. It is clear that if the Supreme Court had actually weighed the cost versus the benefits of the exclusionary rule, it would not have created a good faith exception.

3. Dangerous Implications for the Future

The most troubling aspect of the *Leon* decision is the authority it will give the Supreme Court to further emasculate the exclusionary rule. In *Illinois v. Krull*,[132] a detective relied, in good faith, on a statute which appeared to authorize a warrantless search of the respondent's business.[133] The statute was subsequently held to be unconstitutional, but the evidence seized pursuant to the statute was not supressed at trial. Paraphrasing the language from *Leon*, the Supreme Court reasoned: "Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."[134]

Based on the *Krull* case, it seems likely that the Supreme Court will use *Leon* as precedent for a good faith exception in warrantless situations.[135] It is also likely that when the Court

130. *Id.* at 955.

131. *See* LaFave, *supra* note 80, at 906-09.

132. 107 S. Ct. 1160 (1987).

133. *Id.* at 1163.

134. *Id.* at 1167.

135. This question would have been answered had it not been for the death of the defendant in People v. Ouintero, 657 P.2d 948 (Colo. 1983). *See also* New Jersey v. T.L.O., 469 U.S. 325 (1985) (school officials may conduct warrantless searches if there are reasonable grounds to believe the student has violated school rules); United States v. Johns, 469 U.S. 478 (1985) (federal agents did not violate fourth amendment standards

applies its cost - benefit analysis to the warrantless search, the outcome will be in favor of admitting the evidence. Under this rationale, as long as the police were acting in "good faith," the deterrent value of the rule would not be furthered by excluding relative and probative evidence. This would complete the Supreme Court's "victory over the fourth amendment exclusionary rule"[136] and leave the states as the only source of protection for the rights of the criminal defendant.

IV. THE "NEW FEDERALISM" IN THE STATES

The fourth amendment exclusionary rule is not the only entity that has suffered because of the Burger Court's preference for effective law enforcement. The fifth amendment right against self-incrimination and the sixth amendment right to counsel were also narrowly construed.[137] The decisions handed down quickly conveyed the Burger Court's intention to constrict the rights given to criminal defendants during the Warren era. As the scope of federally based rights narrowed, a "new federalism" emerged among the states.[138] In an effort to provide greater protection under state law than that required by the Federal Constitution, state courts began to reject the restrictions on rights pronounced by the United States Supreme Court:

> The teachings of the Warren Court concerning the rights of criminal defendants have not fallen on deaf ears. Many state judiciaries have greeted the Burger Court's retreat from activism not with submission, but with a stubborn independence that displays a determination to keep alive the Warren Court's philosophical commitment to protection of the criminal suspect.[139]

---

when they conducted a warrantless search of packages found in vehicles seized three days before search).

136. *Leon*, 468 U.S. at 929 (Brennan, J., dissenting).

137. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433 (1974); Ross v. Moffitt, 417 U.S. 600 (1974); United States v. Ash, 413 U.S. 300 (1973); Kirby v. Illinois, 406 U.S. 682 (1972).

138. Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 425 (1974) [hereinafter Wilkes, *The New Federalism*].

139. Wilkes, *More on the New Federalism*, *supra* note 2, at 873.

The states' willingness to provide for rights lost under the federal good faith exception is the latest example of new federalism in criminal procedure. Rejection of the *Leon* decision acknowledges its unsound reasoning and the states' refusal to submit to the "seductive call of expediency."[140]

The state court decisions rejecting the good faith exception are based on the adequate state ground rule. Under this doctrine, the United States Supreme Court is precluded from reviewing a state court decision that rests on an adequate state ground, even if it involves a federal question.[141] In criminal cases, the state ground asserted is usually a state rule of procedure. However, the doctrine also includes substantive grounds. Thus, the rule enables a state court to "immunize its decisions from [Supreme] Court review by basing its judgment on a state right which is coextensive with or broader than rights afforded by federal law."[142]

In *State v. Novembrino*,[143] the New Jersey Superior Court noted the broadness of Article I, Section 7 of the New Jersey state constitution as compared to the fourth amendment: "Art. I, § 7 is an explicit affirmation of fundamental rights of privacy; it is a guarantee of those rights and not simply a restriction on them."[144] Based on the structural differences between the state and federal constitutions and New Jersey's history of adherence to the protective rules governing search warrants, the court declined to adopt the good faith exception.

---

140. United States v. Leon, 468 U.S. 897, 930 (1984) (Brennan, J., dissenting). The Warren Court often encouraged states to impose higher standards than those required by the Federal Constitution. The Burger Court also acknowledged the right of the state courts to ground their decisions in state law. However, it was usually the dissenting opinions of Justices Brennan, Marshall and Stevens that cautioned that the guarantees extended under the Federal Constitution are minimum guarantees only. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

141. The Supreme Court has jurisdiction to review state court decisions pursuant to 28 U.S.C. § 1257, provided the state judgment involves a federal question. Although the statute authorizes review of state judgments involving federal questions regardless of the presence of questions of state law, the Supreme Court has consistently declined to review judgments resting on an adequate state ground. *See* Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972); Wilkes, *The New Federalism*, *supra* note 136, at 426-27; Note, *Rights of Criminal Defendants: The Emerging Independence of State Courts*, 1979 HAMLINE L. REV. 83.

142. *See* Wilkes, *More on the New Federalism*, *supra* note 2, at 873-74.

143. 200 N.J. Super. 229, 491 A.2d 37 (1985).

144. *Id.* at __, 491 A.2d at 43.

According to the New Jersey Superior Court, the *Leon* good faith exception eliminates any meaningful review of probable cause determinations:

> Long experience with the suppression rule leaves us with the settled conviction that once the police act under cover of a warrant, even though issued without probable cause, as a practical matter their good faith is immune to attack. The *Leon* good faith exception contemplates that appellate courts defer to trial courts and trial courts defer to the police. It fosters a careless attitude toward details by the police and issuing judicial officers and it even encourages them to attempt to get away with conduct which was heretofore viewed as unconstitutional.[145]

Because of the broader protection guaranteed to an individual under the New Jersey Constitution, the court held that the state is not permitted to introduce evidence which has been seized without probable cause. According to the court, "[t]he admission of that evidence would not only violate N.J. Const. (1947), Art. I, § 7, but would violate the integrity of the court and the State's long tradition of providing a meaningful remedy to redress constitutional violations."[146]

Rejecting a federal decision as violative of the state constitution is a valid exercise of state power. Although the Supreme Court's interpretation of similar provisions of the Federal Constitution is persuasive, it is binding only to the extent that the Court's reasoning is logical.[147] In *Stringer v. State*,[148] the Mississippi Supreme Court was unpersuaded by the *Leon* analysis:

> The fundamental error in *Leon* is its failure to perceive that its new "insight" — that in the type of cases we are concerned with it is the issuing magistrate who violates the accused's Fourth Amendment rights, not the police officer — suggests a greater need for the exclusionary rule, not a lesser one.[149]

The court explained that theoretically citizens may bring a civil damage claim against a police officer who violates fourth

---

145. *Id.* at __, 491 A.2d at 45.

146. *Id.* at __, 491 A.2d at 46.

147. Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 281-82.

148. 491 So. 2d 837 (Miss. 1986).

149. *Id.* at 849.

amendment standards. Against the issuing magistrate, however, the citizen is left without a remedy because the judiciary enjoys an absolute immunity to a suit for damages.[150] This leaves the individual with a right but no remedy to ensure that issuing magistrates take their responsibilities seriously.

The court in *Stringer* criticized the Supreme Court for not considering the practical implications of the *Leon* decision. Instead of suggesting an appropriate alternative, the Supreme Court simply stated that the exclusionary rule is designed to deter police misconduct and concluded that it does not achieve that end. The *Leon* decision never considered that the exclusionary rule is the only practical means of getting the attention of issuing magistrates who disregard the rights of persons to be free from unreasonable searches.[151] Furthermore, enforcement of the rule restores the status quo. If the state had not conducted the illegal search, it would not have the evidence it seeks to use against the defendant at trial. Therefore, exclusion returns the parties to their pre-violation position.[152]

The Mississippi Supreme Court noted that although the exclusionary rule might be obsolete in other jurisdictions, it still regarded the rule as an important means of protecting Mississippi citizens from searches made pursuant to warrants issued without probable cause. "Until our attention is called to substantial recurring miscarriages of justice proximately flowing from the enforcement of our exclusionary rule and until equally effective alternatives are presented, we should not consider abandonment of our rule."[153]

Similarly, the Supreme Court of New York did not consider the good faith exception an effective alternative. In *People v. Bigelow*,[154] the court stated that if the good faith exception was adopted, "the exclusionary rule's purpose would be completely frustrated, a premium [would be] placed

150. *Id.*

151. *Id.*

152. *Id.* at 850.

153. *Id.* at 842. The court stated that "the adoption of the new federally modified exclusionary rule more reflects a shift in judicial/political ideology than a judicial response to demonstrable and felt societal needs. If [the exclusionary rule] ain't broke, why fix it?" *Id.* at 849-50.

154. 66 N.Y.2d 417, __, 488 N.E.2d 451, 458, 497 N.Y.S.2d 630, __ (1985).

on the illegal police action and a positive incentive [would be] provided to others to engage in similar lawless acts in the future." The court, therefore, rejected the *Leon* decision on state constitutional grounds.

Other states refusing to blindly follow the Supreme Court include Michigan,[155] Minnesota[156] and Texas.[157] Idaho implied it will reject the good faith exception when the issue is properly presented.[158] While the number of states rejecting the good faith exception remain in the minority, they are nevertheless of tremendous importance. They reflect an effort to "breathe new life into the federal due process clause" by interpreting their constitutions more expansively than the Federal Constitution.[159] Those that criticize state court independence because of the lack of uniformity it produces, ignore the fact that the federal system has always tolerated variations in substantive criminal laws. State and federal governments properly have differing rules of criminal procedure to accommodate the different purposes they serve. States should be encouraged to experiment with different approaches in an effort to obtain the best system possible.

Nevertheless, some state courts remain content to interpret state constitutional provisions exactly as the Supreme Court interprets their federal counterparts. In comparing numbers, it appears that many states have affirmed the reasoning of the Supreme Court in *Leon*. Upon closer observation, however, it is clear that many of the jurisdictions did not embrace the merits of the *Leon* decision but employed a good faith exception for some other reason. For example, Colorado has a statutory good faith exception. The statute is divided into good faith mistakes and technical violations, both of which were discussed in *People v. Mitchell*.[160] The court noted that the statutory definition of "good faith mistake" — an error in facts that if true would otherwise constitute probable cause — was merely a redefinition of probable cause. A technical violation was defined as a good faith reliance on a statute

155. *See* People v. David, 119 Mich. App. 289, 326 N.W.2d 485 (1982).
156. *See* State v. Houston, 359 N.W.2d 336 (Minn. Ct. App. 1984).
157. *See* Polk v. State, 704 S.W.2d 929 (Tex. Ct. App. 1986).
158. *See* State v. Johnson, 110 Idaho 516, 716 P.2d 1288 (1986).
159. *See* Brennan, *supra* note 140, at 503.
160. 678 P.2d 990 (Colo. 1984).

later overruled or a court precedent subsequently striken. In *Mitchell*, the warrant was not issued in reliance on mistaken facts. Instead, the warrant failed because the evidence demonstrated no facts to justify its issuance. Thus, the statutory good faith exception did not apply.[161] It is clear that this situation is more analogous to the *Michigan v. DeFillippo*[162] decision, than to the good faith exception adopted in *Leon*.

Ohio's decision to adopt the good faith exception was not based on the merits of *Leon* but on a pre-existing state court opinion to that effect. In *State v. Williams*,[163] the appellant contended that his arrest, executed without a warrant, violated both his fourth and fourteenth amendment rights. Relying on a case decided after his detention in which the Supreme Court invalidated warrantless searches, he asserted that the illegally seized evidence should be suppressed. After extensively quoting from *United States v. Peltier*,[164] the court refused to apply the exclusionary rule retroactively because the police officers had effected the arrest in good faith reliance on a then constitutional statute.[165] Again, the decision was based on the exception created in the *DeFillippo* and *Peltier* cases rather than the good faith exception established in *Leon*.

Finally, there are states which have adopted the *Leon* exception because the scope of the state exclusionary rule is coextensive with the federal rule. For example, a 1982 amendment to Article I, Section 12 of the Florida Constitution removed that state's option to provide greater protection to its citizens. The amendment provides:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if [they] would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment . . . .[166]

---

161. *Id.* at 995-96. *See* Note, People v. Mitchell: *The Good Faith Exception in Colorado*, 62 DEN. U.L. REV. 841 (1985).

162. 443 U.S. 31 (1979). *See supra* note 78 and accompanying text.

163. 6 Ohio St. 3d 281, 452 N.E.2d 1323 (1983).

164. 422 U.S. 531 (1975).

165. *Id.* at __, 452 N.E.2d at 1328-29.

166. FLA. CONST. art. I, § 12, (1982). *See* State v. Bernie, 472 So. 2d 1243 (Fla. Dist. Ct. App. 1985); State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983).

Since the exclusionary rule is written into the text of the state constitutional guarantee against unreasonable searches and seizures, it is subject to the United States Supreme Court's shifting interpretation of the rule.

Likewise, a 1982 amendment providing that "relevant evidence shall not be excluded in any criminal proceeding" defeated the new federalism movement in California.[167] In *People v. Lance W.*,[168] the court held that this provision abrogated the state's "vicarious" exclusionary rule but did not repeal the Section Thirteen guarantee against unwarranted governmental intrusions. However, the amendment did eliminate the judicially created exclusionary rule in criminal proceedings, regardless of how the evidence was obtained, "except to the extent that exclusion remains federally compelled."[169] Thus, evidence seized in violation of state constitutional standards is excluded only if mandated by the federal exclusionary rule.

The great majority of states that have adopted *Leon* do so without any independent analysis.[170] Although it may be convenient, this is a perilous trend. If the decisions of the Supreme Court continue to interpret the Constitution as only providing minimal standards of protection, all rights above this minimum level will exist only by virtue of state law. To summarily dismiss the option to provide greater protection is to deny the individual his last source of hope.

---

167. CAL. CONST. art. I, § 28(d). The California Constitution provides:

> Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

Id.

168. 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985).

169. *Id.* at 887, 694 P.2d at 752, 210 Cal. Rptr. at 639.

170. *See, e.g.*, McBride v. State, 492 So. 2d 654 (Ala. Crim. App. 1986); Toland v. State, 285 Ark. 415, 688 S.W.2d 718 (1985); State v. Cooper, 9 Conn. App. 15, 514 A.2d 758 (1986); Matter of M.R.D., 482 N.E.2d 306 (Ind. 1985); State v. Sweeney, 701 S.W.2d 420 (Mo. 1985); State v. Welch, __ N.C. __, 342 S.E.2d 789 (1986); State v. Gronlund, 356 N.W.2d 144 (N.D. 1984); McCary v. Commonwealth, 228 Va. 219, 321 S.E.2d 637 (1984).

Individuals have a right to be protected from unreasonable searches and seizures. At the same time, society has a right to disturb the privacy of individuals if necessary to enforce criminal laws. The Constitution recognizes the need for effective law enforcement and prescribes the methods by which police may proceed. In cases where the methods are adhered to, the exclusionary rule does not operate. In cases where the government abuses its power, however, the individual is entitled to an effective remedy such as the exclusionary rule. Thus, a balance is built into the Constitution itself.

Unfortunately, the Supreme Court has distorted this balance. Faced with the increasing levels of crime, the Court continually modified the exclusionary rule in an effort to convict the guilty. Although fighting crime is an admirable goal, the Supreme Court has gone too far. By adopting the good faith exception they have effectively undermined the protection of the exclusionary rule and left the individual without a remedy for the violation of his fourth amendment rights. The *Sheppard* Court announced that an "error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake."[171] This statement is little consolation to the victim whose privacy has been unconstitutionally invaded and who faces the prospect of having the illegally seized evidence used against him at trial. Although it is impossible to foresee exactly what impact the good faith exception will have on fourth amendment law, it is likely that the exception will be broadly construed for the sake of expediency.

State courts that have avoided the good faith issue should be aware of the threat the *Leon* decision poses to individual rights.[172] Because of this threat, an increasing number of states have rejected the good faith exception.[173] Refusing to sacrifice constitutional rights in exchange for effective law enforcement, they have used their state constitutions to limit the

171. Massachusetts v. Sheppard, 468 U.S. 981, 990 (1984).

172. *See, e.g.*, State v. Shifflett, 199 Conn. 718, 508 A.2d 748 (1986); State v. Bousman, 387 N.W.2d 605 (Iowa 1986); State v. Brady, 130 Wis. 2d 443, 388 N.W.2d 151 (1986). For a discussion of the good faith exception's place in Wisconsin see 59 WIS. B. BULL. 19 (1986).

173. *See supra* notes 143-58 and accompanying text.

broad grant of power given to the government by the Supreme Court. Hopefully, state courts that have not ruled on the good faith issue will follow their example. Further, the states that have adopted the *Leon* decision should reconsider and join the new federalism movement. Without state protection, fourth amendment rights will continue to be eroded.

V. CONCLUSION

Whenever the scope of the exclusionary rule is modified in the interest of effective law enforcement, there is necessarily a shift in the delicate balance of our right to privacy versus our right to be free from criminal attack. By creating the good faith exception, the Supreme Court destroyed that balance by disregarding individual rights and leaning too heavily in favor of convicting the guilty. Some states have countered by rejecting the good faith exception and by keeping their state exclusionary rules intact. They recognize that abandonment of the rule would result in a loss of respect for constitutional values and would deny a remedy to the victims of unlawful official behavior.

CAROLYN A. YAGLA*

* The author would like thank Professor Christine M. Wiseman for her guidance on this article.